STATE OF MICHIGAN

COURT OF APPEALS

VAUGHN GUILD,

Plaintiff-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

UNPUBLISHED
November 25, 2014

No. 317195
Ingham Circuit Court
LC No. 12-000118-CD

Before: K. F. KELLY, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant applies by leave granted an order denying in part its motion for summary disposition in this wrongful termination case. We reverse and remand for entry of judgment in favor of defendant.

Plaintiff worked for defendant for approximately seven years. He was one of several psychologists at defendant's Muskegon facility. Plaintiff worked with groups of approximately 13 sexual offenders and assaultive offenders. One of plaintiff's responsibilities was preparing a "therapy termination report" for each inmate in the group within five business days of the completion of the group therapy. The database had a security system that locked a report 24 hours after it was created. If a psychologist needed to add to a report after it was locked, he had to use a process for creating an addendum.

In 2008, plaintiff was not completing his reports on time. At his deposition, plaintiff contended that the deadlines were unrealistic. At any rate, defendant undertook disciplinary measures to attempt to get plaintiff into compliance with the job expectations. At some point, plaintiff's supervisors discovered that plaintiff was beginning or "opening" several reports at once and putting in only the "critical data." The reports would lock, and plaintiff would return to complete them later, sometimes weeks later, using the addendum process. He used the addendum process to complete the reports and sometimes to change his previous ratings in the reports as well. A witness testified that plaintiff's action of leaving incomplete reports in the system gave rise to a risk that the parole board would view them and make decisions based on them in an incomplete form that plaintiff would later change.

Plaintiff was terminated on January 21, 2009. Plaintiff filed a grievance regarding his termination and an arbitration hearing was held. Eventually, the parties reached a settlement and plaintiff was expected to return to work in August 2009. However, defendant then completed an

ongoing investigation and concluded that plaintiff had been falsifying documents and, after a disciplinary hearing on August 28, 2009, it again terminated plaintiff's employment.

On February 2, 2012, plaintiff filed a four-count complaint alleging retaliatory discharge in violation of public policy, retaliatory discharge for the assertion of statutory rights, age discrimination[1] in violation of the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq*., and discrimination on the basis of disability in violation of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1201 *et seq*.[2]

Defendant moved for summary disposition. Defendant relied on MCR 2.116(C)(4) (lack of subject-matter jurisdiction), MCR 2.116(C)(7) (governmental immunity), and MCR 2.116(C)(10) (lack of genuine issue of material fact).

The trial court granted summary disposition with regard to plaintiff's counts I and II. With respect to counts III and IV, the court denied summary disposition, stating:

> At this point it might be premature to grant summary disposition on Counts 3 and 4. I would think it's a fact question as to whether or not Count 4, Mr. Guild, when he presented his information for the Department, if he was misrepresented at the arbitration, wouldn't carry much [sic]. It's a fact question as to what point did the State know did he submit documentation. What's the State's policy if one requests accommodations in support, et-cetera [sic].
>
> In regards to Counts 3-4. Count 3, Count 3 is super thin. Super thin. And Count 4, the disability, I think there remains fact questions in that regard. So I am going to deny the State's motion without prejudice to Counts 3 and 4. I will grant the motion for Counts 1 and 2. . . . So I will grant motions to Counts 1 and 2 and deny requests for Counts 3 and 4 without prejudice at this time.

This Court reviews de novo a trial court's determination concerning a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." The court must consider all the pleadings and evidence when deciding the motion. *Maiden*, 461 Mich at 120. A genuine issue of material fact exists if "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Once the moving party has identified and supported issues about which there are allegedly no disputed issues of material fact, the burden is on the nonmoving party to show that disputed issues exist. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547

[1] Plaintiff was 57 years old in 2008.

[2] Plaintiff alleged that he had a sleep disorder.

NW2d 314 (1996). The nonmoving party "must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id*.

MCL 37.2202 provides, in pertinent part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

In order to establish age discrimination, a plaintiff must establish a "causal link between the discriminatory animus and the adverse employment action." *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 134-135; 666 NW2d 186 (2003). A plaintiff may prove discrimination with either direct or indirect evidence. See *Hazle v Ford Motor Co*, 464 Mich 456, 461-463; 628 NW2d 515 (2001).

If there is no direct evidence that an employer's decision was motivated by age, the plaintiff may establish a prima facie case through indirect evidence of age discrimination. *Id*. at 462. To do this, the plaintiff must present evidence from which a finder of fact could infer that the plaintiff was a victim of unlawful discrimination using the burden-shifting approach established in *McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Hazle*, 464 Mich at 462.

Under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case by presenting evidence that (1) he belonged to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle*, 464 Mich at 463. If the plaintiff can establish a prima facie case, a presumption of discrimination on the part of the defendant is created. *Id*. The defendant may rebut the presumption by showing that the adverse employment action was taken for a legitimate, nondiscriminatory reason. *Id*. at 464. "At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Id*. at 465 (internal citation and quotation marks omitted).

Defendant does not dispute that plaintiff satisfied the first two elements. He was in a protected class and he suffered an adverse employment action.

However, even assuming that plaintiff was qualified for his position, he offered no evidence to show that the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. Plaintiff offered no evidence that a younger person was hired to replace him or that "others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).

Plaintiff claims that defendant did not scrutinize the work of the other psychologists. However, he did not establish that the other psychologists were younger but similarly situated to him, i.e., that they had the same problems that plaintiff was having in timely completing the required reports but were outside the protected class. The evidence plaintiff relied on is a chart that he created showing the psychologists' output. The chart contains no references to ages. Plaintiff's assertions of age discrimination are not supported by the record and we will not permit an expansion of the record on appeal. *In re Harper*, 302 Mich App 349, 360 n 3; 839 NW2d 44 (2013).[3] Plaintiff simply failed to establish a prima facie case of age discrimination by direct or indirect evidence. Defendant was entitled to summary disposition of this count under MCR 2.116(C)(10).

Under the PWDCRA, an employer may not "[d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability . . . that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b). To establish a discrimination claim under the PWDCRA, a plaintiff must demonstrate that he is disabled as defined in the act, that the disability is unrelated to his ability to perform his job duties, and that he has been discriminated against in one of the ways set forth in the statute. *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004). After a plaintiff shows that he is a qualified person with a disability entitled to protection, he must then demonstrate that the employer engaged in prohibited discriminatory conduct. *Id*. at 205.

Plaintiff claims that he suffers from a sleep disorder, for which he takes medication. He states that the disorder does not affect his ability to perform his job. Plaintiff alleges that defendant discriminated against him because of his disorder by investigating and discharging him despite his abilities, MCL 37.1201(1)(b), and by classifying him as an employee with timeliness problems, MCL 37.1201(1)(c).

At his deposition, plaintiff testified that he did not consider himself to be disabled. When asked for the name of his sleep disorder, he testified, "I couldn't give you the precise name." He stated, "There's certain accommodations I need and usually they are pretty minor, things like not having a noisy office, and then I'm able to work as well as anyone else." When asked how defendant was aware of the alleged disability, he stated that he disclosed it "[v]erbally during an interview." He stated, "I don't make a great point of it, but I make sure that I say it." When asked exactly whom he told about the disorder, he responded:

> That would have been to -- well, there were two interviews, okay. I believe I made that statement to Mr. Howard Hillman and to Mr. Gildersleeve at the time of my first interview, *though I'm not certain of that*, and that would have been back in 2004, and *I can't recall precisely, okay*. There was nothing ever questioned about it after that. And I am certain that when I began working for Mr. Hillman I immediately told him that I was on medication which would affect

[3] We note that the lower court record contains only partial deposition transcripts. In this opinion we rely on the deposition pages provided below.

> my alertness if I did not take it and that I did not possess that medication at work because it was a sustained release medication, I took it in the morning. [Emphasis added.][4]

We conclude that plaintiff's vague statements about an unnamed disorder that *he himself does not consider a disability* and his vague statements regarding informing defendant about this disorder (as opposed to his more certain statements regarding informing defendant about a medication he was taking) are simply not sufficient to establish a genuine issue of material fact that defendant disciplined and fired plaintiff based on a disability.[5]

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Patrick M. Meter

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[4] Plaintiff later made a statement regarding telling another person about the sleep disorder after he came back to work from a medical leave of absence that he admits was *unrelated* to the sleep disorder. This testimony was again vague and failed to indicate that defendant would have viewed plaintiff as "disabled." Plaintiff testified, "All she knew was that I was off for an extended medical leave. I came back, and the first thing I told her was about the sleep disorder and my medication." Plaintiff explained that he had to make statements about the medication because of rules pertaining to medication in the employee handbook.

[5] Plaintiff alleged in his complaint that defendant "was predisposed to discriminate on the basis of his disability and acted in accordance with that predisposition." To the extent that plaintiff may have alleged a "failure to accommodate" claim, such a claim requires a written request to accommodate, of which there is no evidence in the lower court record. See MCL 37.1210(18).